IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

LETTERS PATENT APPEAL No 1800 of 1999
in
SPECIAL CIVIL APPLICATIONNo 4734 of 1999
With
CIVIL APPLICATION NO 15101 OF 1999

AND

LETTERS PATENT APPEAL NO 1849 OF 1999
in
SPECIAL CIVIL APPLICATION NO 6346 OF 1999
With
CIVIL APPLICATION NO 15349 OF 1999

For Approval and Signature:

Hon'ble CHIEF JUSTICE MR DM DHARMADHIKARI

AND
MR.JUSTICE C.K.THAKKAR

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : YES

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

THAKKAR DHARATIBEN HARIBHAI

Versus

STATE OF GUJARAT

Appearance:

MR J.R. Nnavati, Sr.Counsel with Mr. PRADEEP PATEL for Appellants In LPA No. 1800 of 1999

Mr B.S. Supehia, Ld. counsel for Appellant in LPA No. 1849 of 1999

Ld. Addl. Advocate General Mr. S.N. Shelat with Ld.AGP Mrs. Manisha Lavkumar for Respondent State

MR KG PANDIT for Respondent No. 2

CORAM : CHIEF JUSTICE MR DM DHARMADHIKARI and
MR.JUSTICE C.K.THAKKAR

Date of decision: 16/02/2000

CAV COMMON JUDGEMENT

Per: D.M. Dharmadhikari, C.J. :-

Heard the learned counsel for the parties. Both the appeals are admitted and taken up for final hearing.

1. Letters Patent Appeal No. 1800 of 1999 under Clause 15 of the Letters Patent Appeal is being decided analogously with Letters Patent Appeal No. 1849 of 1999, which we heard together and in which common questions of fact and law arise.

2. The appellants in both the appeals are students who have passed 12th standard Science Stream examination and seek admission to first year degree course in Homeopathy Medicine in different colleges in the State of Gujarat for obtaining degree of Bachelor of Homeopathy Medicine And Surgery (B.H.M.S.). In Special Civil Applications they approached this Court to challenge the decision of the State of Gujarat dated 16-6-1999, whereby for the academic session 1999-2000 for admission to BHMS course the minimum prescribed eligibility qualification for admission for general candidates is laid down as 50 % marks and for reserved category 40 % marks.

3. All the appellants before us have passed their 12th standard examination equivalent to intermediate with subjects in Science group, but have secured less than 50 % marks (as general candidates) and 40 % marks (as reserved candidate). Under the impugned decision of the State Government, they are, therefore, ineligible for admission to the BHMS course.

4. Before the Learned Single Judge, the Resolution of the State Government prescribing the above minimum percentage of marks (50 % for general candidates and 40% for reserved candidates) was assailed mainly on two grounds. Firstly it was contended on behalf of the students that the impugned decision of the State Government laying down different minimum qualifications for admission to BHMS course in colleges in the State of Gujarat is inconsistent or contravenes the Regulation-4 of the Homeopathy (Degree Course) Regulations, 1983, which is framed under Clauses (i) (j) & (k) of Section 33 read with Section 20 (1) of the Homeopathy Central Council Act, 1973 (hereinafter referred to shortly as the 'Regulations' and the 'Act' respectively).

5. The second ground urged is that the change of criteria of admission to the course under the impugned decision of the State Government, after the students have appeared in the examination equivalent to intermediate, deprives them of chance of admission at a stage when they cannot improve their performance to attain the minimum requisite percentage of marks. The doctrine of 'Promissory Estoppel' or 'Legitimate Expectation' was sought to be urged in support of their petition claiming relief of direction to the State and the College authorities for relief of grant of admission to them.

6. On behalf of the State of Gujarat, the impugned decision of the State laying down the above mentioned minimum marks as the eligibility criteria for admission has been supported on the ground that, under the Act and the Regulations the Central Council of Homeopathy has merely laid down on uniform basis the minimum qualifications for grant of admission to BHMS course. The State Government in prescribing higher percentage of marks for the qualifying examination, as a condition of admission to the course, has not in any manner contravened any provisions of the Regulations and cannot be held to have taken any decision inconsistent with the Act or the Regulations.

7. The Central Council of Homeopathy has also been made a party. From its reply on affidavit before the Learned Single Judge, and the averments made therein it appears that the action of the State Government has been supported, but in the course of hearing, learned counsel appearing for the Council tried to support the case of the students by contending that, in prescribing higher percentage of marks as a pre-condition of admission to the BHMS course, the State Government is encroaching upon the exclusive legislative field of the Central Council of

Homeopathy, as under the provisions of the Act, particularly section 20 thereof the Council alone is empowered to lay down minimum qualifying marks for admission to the BHMS course.

The alternative submission made by the learned counsel appearing for the Central Council is that, as indicated by Sub-section (2) of Section 20 of the Act, without consultation with and concurrence of the Central Council, the State Government could not have deviated f[rom the norms laid down as minimum qualification for admission to Homeopathy Colleges in the State of Gujarat.

8. Learned Single Judge negatived all the contentions advanced on behalf of the students. He held that in prescribing higher percentage of marks as minimum eligibility for grant of admission, the State Government has in no manner contravened the provisions of the Act or the Regulations and cannot be said to have encroached upon any legislative field exclusively earmarked for the Central legislature. Learned Single Judge also negatived all other pleas raised on doctrine of Promissory Estoppel or Legitimate Expectation.

9. In these Letters Patent Appeals preferred against the judgment of the learned Single Judge, learned Sr. Counsel appearing in the two LPAs before us has mainly relied on the decision of the Division Bench of the Supreme Court in case of STATE OF TAMILNADU AND ANOTHER, Vs. ADHIYAMAN EDUCATIONAL & RESEARCH INSTITUTE AND OTHERS, (1995) 4 SCC, 104. It is submitted that, learned Single Judge was wrong in not relying on the aforesaid decision and distinguishing the same on wrong premises. Learned counsel to support his arguments advanced on behalf of the students has drawn attention of this Court to the conclusions recorded by the Bench of the Supreme Court in case of State of Tamilnadu (supra) and particularly conclusion nos. (v) and (vi) recorded in para-41 of the judgment, which read as under:-

" (v) When there are more applicants than the available situations/seats, the State authority is not prevented from laying down the Central authority to short-list the applicants. When the State authority does so, it does not encroach upon Entry 66 of the Union List or make a law which is repugnant to the Central Law.

(vi) However, when the situations/seats are available and the State authorities deny an applicant the same on the ground that the

applicant is not qualified according to its standards or qualifications, as the case may be, although the applicant satisfies the standards or qualifications laid down by the central law, they act unconstitutionally. So also when the State authorities de-recognise or disaffiliate an institution for not satisfying the standards or requirement laid down by them, although it satisfied the norms and requirements laid down by the Central authority, the State authorities act illegally. "

Placing reliance on the above conclusions recorded by the Supreme Court in the case of State of Tamilnadu (supra), it is urged that where there are more applicants than the available seats in the colleges it was not open to the State Government to take a decision to restrict admission to students securing 50 % or 40 % of marks in the qualifying examination in case of general and reserved category students respectively.

10. Learned Government counsel appearing on behalf of the State of Gujarat supported the decision of the State of Gujarat in restricting admission to students passing the qualifying examination with 50 % or 40 % marks. The justification for the decision is shown in para-6 of the return of the State which needs reproduction:-

" (6) It is stated that in the medical colleges, the minimum admission standard is of 55%. Even in Ayurvedic Colleges there minimum admission standard is 50 %. It is observed by the Government that by reducing the admission percentage periodically, the efficiency has been affected adversely, because Homeopathy course covers almost all medical subjects in English. It is also stated that the passing standard of B.H.M.S. degree course is 50 %. It is also observed by the Government that by reducing the percentage the number of self financed colleges have been increased and the admission seats are also increased and, therefore, the seats remains vacant. From the academic year 1998-99, all Homeopathic Colleges in the State have covered under centralised admission. The matter is closely related with the life of human beings and hence percentage of admission should be at par with the other medical faculties like allopathy and ayurvedic medicines. This increase in the percentage does not affect any scholar students.

"

11. On behalf of the State to support its stand that the laid down higher percentage of marks as eligibility criteria for admission to the Homeopathy Colleges, there has been no contravention of any provisions of the Act or the Regulations, reliance is placed on two decisions of the Supreme Court in DR. AMBESH KUMAR VS. PRINCIPAL, LLRM MEDICAL COLLEGE, MERUT & ORS, A.I.R. 1987, S.C. 400, which was relied in OMBIR SINGH & ORS ETC. VS. STATE OF U.P. AND ANR. ETC. A.I.R. 1993, S.C. 975. It is submitted that in the Constitution Bench decision of the Supreme Court in DR. PREETI SRIVASTAVA AND ANOTHER VS. STATE OF M.P. AND OTHERS, (1999) 7 SCC, 120, earlier two bench decisions of the Supreme Court in case of Dr. Ambesh Kumar and Ombir Singh (supra) have been cited with approval and they therefore hold the field. On behalf of the State, the judgment of the Supreme Court in case of State of Tamil Nadu Vs. Adiyaman Edu. & Research Institute (supra) is sought to be distinguished on the ground that the decision has to be read in context of the facts and circumstances obtaining in that case.

12. For deciding merits of the contentions advanced before the Learned Single Judge and before this Court in the LPAs, it is necessary to examine the provisions of the Central Act and the Regulations, the contravention of which has been alleged before us. As per the Statement of Objects & Reasons of the Act of 1973, the Central Legislature brought the Act constituting Central Council of Homeopathy for the purpose of evolving "Uniform standards of education in Homeopathy and the registration of practitioners of Homeopathy". The legislation in question is referable to Entry-66 of Union List-I of the Seventh Schedule of the Constitution. Entry-66, List-I reads:-

" Co-ordination and determination of standards in institutions for higher education or research and scientific and technical institutions."

13. Section 20 of the Act which is relevant for our purpose reads as under:-

" Sec. 20. Minimum standards of education in Homeopathy - (1) The Central Council may prescribe the minimum standards of education in Homeopathy, required for granting recognised medical qualifications by Universities, Boards or

medical institutions in India.

(2) Copies of the draft regulations and of all subsequent amendments thereof shall be furnished by the Central Council to all State Governments and the Central Council shall before submitting the regulations or any amendment thereof, as the case may be, to the Central Government for sanction, take into consideration the comments of any State Government received within three months from the furnishing of the copies as aforesaid. "

Section-33 confers power on the Central Council to make Regulations. In exercise of that power to make regulations, amongst others, on subjects mentioned in clauses (i) (j) & (k) of Sec. 33, the Central Council of Homeopathy has framed Regulations. Regulation No.4 alone is relevant for the purpose of this case which reads as under.

" 4. Minimum qualifications : No candidate shall be admitted to the B.H.M.S. (Degree) Course unless he has :-

(a) Passed the Intermediate Science or its equivalent examination with Physics, Chemistry and Biology as his subjects:

(b) attained the age of 17 years on or before 31st December of the year of his admission to the first year of the Course. "

14. Under Entry-25 of the Concurrent List of 7th Schedule of the Constitution, the State can also exercise legislative power to make laws on the subject of education, including technical and medical education, but subject to the provisions of Entry-66 of List-I. The relevant Entry-25 in the Concurrent List reads as under.

" 25. Education, including technical education, medical education and universities, subject to the provisions of Entries 63, 64, 65 and 66 of List I; vocational and technical training of labour :

The State Government has not framed any law on the basis of Entry-25 of the Concurrent List quoted above. It is not disputed that in accordance with Article 162 of the Constitution the executive power of a State extends to the matters with respect to which the legislature of the State has power to make laws. The impugned decision taken by the State Government by issuing executive instructions to regulate admission to the colleges in the State of Gujarat is sought to be supported on behalf of the State by recourse to its executive powers under Article 162 of the Constitution.

15. The main question that falls for consideration before us is, whether in issuing the impugned executive instructions fixing 50 % and 40 % of marks as minimum for two different categories of students for admission to Homeopathy course in the colleges, the State has contravened the provisions of the Act or the Regulations and has made any attempt to encroach upon the legislative field of the Central Legislature ?

On reading Regulation-4 (quoted above) what we find is that the Central Council of Homeopathy have merely prescribed the minimum qualification as Intermediate Science or equivalent examination pass with science group as the minimum eligibility for grant of admission to Homeopathy colleges. The Council has not framed any regulation specifying the method & manner in which admissions can be restricted on the basis of availability of seats with due regard to the merit and other relevant considerations. The State Government in taking decision to prescribe higher minimum qualification for grant of admission to Homeopathy colleges cannot be held to have contravened any provisions of the Regulations.

From the provisions of Sub-section (2) of Section 20 (quoted above), the contention advanced on behalf of the Central Council that without consultation with and concurrence of the Central Council, the State Government could not have prescribed higher minimum qualification as a pre-condition for admission to Homeopathy colleges, cannot be accepted. Sub section (2) of Section 20 requires Central Council to furnish draft regulations and any amendments suggested to the State Governments before submitting the regulations or amendments thereof, as the case may be, to the Central Government for sanction. The Central Council was also required to take into consideration the comments of the State Government received to the draft regulations and amendments proposed to it. On the subject of the shortlisting of candidates

or prescribing of higher minimum standards for admission the legislative field is not occupied by the Central Legislation. It is, therefore, open to the State Government to prescribe higher minimum standards by executive instructions. Its executive power, under Article 162 of the Constitution, extends to the matters, with respect to which it has power to make laws. The executive instructions are on subject of education contained in Entry-25 of the Concurrent List.

The State Government in its reply on affidavit (a portion of which has been quoted above) has shown a reasonable justification for taking the decision to fix eligibility criteria at par with criteria fixed for grant of admission to other medical colleges for the course of MBBS and BAMS. The State Government has also stated in its reply that in the previous academic years, as a result of reduction of percentage of minimum eligibility criteria, several Homeopathy private colleges have increased their seats which remained vacant and the educational standards in Homeopathy were likely to fall. With a view to maintain the standards and to check the indiscriminate increase of seats by private colleges it was found necessary to fix higher qualifications or minimum eligibility criteria for admission to Homeopathy colleges. The decision was taken to maintain reasonable standard of education in Homeopathy Faculty.

16. The following observations in case of DR. Ambesh Kumar (supra) (AIR 1987 S.C. 400) fully support the decision taken by the State Government and the contentions advanced on its behalf before us :

" Since the number of seats for admission to various post-gruaduate courses both degree and diploma in Medical Colleges is limited and a large number of candidates undoubtedly apply for admission to these courses of study, the impugned order laying down the qualification for a candidate to be eligible for being considered for selection for admission to the said courses on the basis of the merit as specified by Regulations made under the Indian Medical Council Act cannot be said to be in conflict with the said Regulations or in any way repugnant to the said Regulations. It does not in any way encroach upon the standards prescribed by the said Regulations. On the other hand by laying down a further qualification of eligibility it promotes and furthers the standard in an institution. 1983 ALL LJ 889, affirmed. "

17. The decision in Dr. Ambesh Kumar (supra) was followed in Ombir Singh Vs. State (supra) (AIR 1993 S.C. 975), which is sought to be distinguished on behalf of the students, stating that, there it was a case of laying down some higher qualifications in the entrance examination. The submission made on behalf of the students is that a distinction is to be drawn between the criteria fixed for ' applying for admission ' and the criteria fixed for 'selection'. It is submitted that the minimum qualification laid down for applying for admission as laid down by the Central Council of Homeopathy cannot be changed by the State Government by executive instructions.

The contention advanced on behalf of the students does not at all impress us, particularly in view of the observations of the Supreme Court in case of Dr. Ambesh Kumar and Ombir Singh (supra), which have been quoted by the Constitutional Bench decision in Dr. Preeti Srivastava Vs. State (1999) 7 SCC, 120. As we have pointed out above, by Regulation-4 the Central Council of Homeopathy has merely laid down for whole of the country the minimum qualification as intermediate or equivalent examination for admission to Homeopathy colleges. The subject or legislative field with regard to restricting admissions to available seats with due regard to maintainance of standards of education remains unoccupied by the Act or the Regulations. Since that legislative field of laying down norms for restricting admissions to available seats on higher qualification remains unoccupied, and there being no legislation by the State under Entry-25 of the Concurrent List, the executive power of the State under Article 162 can be exercised in prescribing higher than the minimum qualification for admission to Homeopathy colleges. It cannot be held that the Regulations have been contravened by the State Government. The State has also given justification for taking the decision to fix higher percentage of marks as minimum eligibility for admission. The decision in case of State of Tamil Nadu Vs. Adiyaman Edu. & Research Institute (supra), on which strong reliance has been placed on behalf of the students, cannot be read out of context. There were two parallel legislations, one by the Union enacting All India Council of Technical Education Act and the other by the State of Tamil Nadu by passing an enactment named Tamil Nadu Private College (Regulation) Act. The Supreme Court found that the field of technical education was in every detail fully occupied by the Central Legislation referable to Entry-66 of the Union List. The Supreme Court therefore held that the

said legislative field occupied by the Central Legislature could not have been encroached upon by State Legislature by enacting a law under Entry-25 of the Concurrent List. Because the power to legislate under Entry-25 is subject to law made by Central Legislature under Entry-66 of List-I. The above distinction is well brought out by the following observations of the Supreme Court in case of State of Tamil Nadu Vs. Adiyaman Edu. & Research Institute which need reproduction.

" 32. As pointed out earlier, so far as technical institutions are concerned, the norms and standards and the requirements for their recognition and affiliation respectively that the State Government and the University may lay down, cannot be higher than or be in conflict and inconsistent with those laid down by the Council under the Central Act. Once it is accepted that the whole object of the Central Act is to determine and coordinate the standards of technical education throughout the country, to integrate its development and to maintain certain standard in such education, it will have to be held that such norms, standards, and requirements etc. will have to be uniform throughout the country. Uniformity for the purposes of coordinated and integrated development of technical education in the country necessarily implies a set of minimum standards of fulfillment of which should entitle an institution and its alumini, titles, degrees and certificates to recognition anywhere in the country. "

The conclusions recorded by the Supreme Court in Para-41 (quoted in earlier paragraph 9 supra) in the said case have therefore to be understood in the context and situation in that case, where two parallel legislations, one by the Union and the other by the State, came up for consideration and comparison for determining its operation and efficacy.

18. The decision of the Supreme Court in State of Tamil Nadu (supra) was rightly distinguished by the learned Single Judge, as in the instant case there are no two parallel legislations for consideration before us to find out any alleged inconsistency or repugnancy between them. As we have pointed bout above Regulation-4 under the Central Act merely lays down that admission to Homeopathy course would be granted only to students who have passed intermediate science or equivalent examination with science group. What would be the

minimum prescribed percentage of marks for grant of admission to the students who had passed the qualifying examination has not been laid down by the Act or the Regulation. That subject of short-listing of candidates or restricting the admission to meritorious students has been left unoccupied. In absence of any law referable to Entry-25 of the Concurrent List, the State could regulate the subject of admission by executive instructions prescribing criteria or qualifications higher than the minimum laid down in Regulation-4. The State Government cannot be held to have acted contrary to or inconsistent with the said Regulation. Merely because there are more seats and less number of applicants for admission is no ground to hold that the action of the State Government is not in consonance with Regulation-4. State Government has given full justification for its decision that reduction of percentage of marks for admission resulted in indiscriminate increase of seats by private colleges and lowering of the standard of education in Homeopathy Medicine. It is the duty of the State Government to maintain the standards of Homeopathy education. It is natural that it should be interested and vigilant about maintaining standards of education in Homeopathy medicine as it is in medical education for admission to courses like MBBS and BAMS.

19. So far as the reliance on 'Doctrine of Legitimate Expectation and Doctrine of ' Promissory Estoppel' is concerned, same can justifiably be rejected by borrowing the reasonings of full bench decision of Bombay High Court in case of ASHWIN PRFULLA PIMPALWAR AND ETC. VS. STATE OF MAHARASHTRA AND OTHERS, A.I.R. 1992 (BOM.) 233, where similar plea was repelled by making following observations.

" 31. The extreme position that a Prospectus once issued by the Government, cannot be altered at all at a subsequent stage has not been canvassed by anyone so far. It would not be correct to lay down such an absolute rule. The Government which has the competence to issue rules or regulations, has, as a corollary, powers to amend or alter or even repeal and reissue such rules and regulations.

32. Does the rule of promissory estoppel operate so that the admission rules once issued could not be altered subsequently by the Government ? It is assumed in some decisions that a student preparing for the qualifying

> examination on the basis of the Prospectus relating to postgraduate courses prevailing at that particular point of time is entitled to continue to receive benefits or advantages arising therefrom and consequently no change can be made to his prejudice. It is difficult to accept such a broad proposition. Students entering educational institutions with the ultimate aim of completing their scholastic career at the peak are expected to strive for academic excellence, and accordingly, it cannot be assumed that a student would only look at a GR operating at or about the time when he intensifies the preparation for the qualifying examination and regulating admission to post-graduate courses. Then again, a student is indeed expected to do his best throughout his scholastic career. The heights are reached not by a sudden flight. They are reached by those who toil upwards in the night while their companions slept (The borrowing from the lines of Longfellow is acknowledged). In a highly competitive examination there is a neck to neck race even among those who spare no pains or times to achieve the coveted goal. Quite often, imponderable factors or fortuitous circumstances may affect the fact. Under such circumstances, it would be unrealistic to posit a theory of promissory estoppel based on the elusive concept of the preparation time for the qualifying examination. "

20. Lastly, the argument advanced on behalf of the students is that, the State Government has no authority to regulate the admissions to private colleges and the decision of the State Government cannot be relied by the private colleges to deny admission. The above argument is not available to the students. The State Government has issued executive instructions to be followed by all the colleges for improving standard of education in Homeopathy medicine. The private institutions have not challenged the decision of the State Government. If uniform standards laid down by the State Government for all the colleges in the State are being followed by private colleges, the students cannot say that those cannot be followed. It is open to the private colleges to act according to the norms laid down by the State Government to regulate admission to colleges in the State of Gujarat.

21. As a result of the discussions aforesaid, Letters

Patent Appeals fail and are accordingly dismissed, but in the circumstances, without any order as to costs. Notice stands discharged in both the appeals. No order on Civil Applications.

/vgn.

Order:-

After the pronouncement of the judgment, learned counsel for the appellants made an oral request for certificate under Article 134 A of the Constitution of India for appeal to the Supreme Court. We do not consider the present cases to be fit for grant of certificate by us, because, in our opinion, the cases do not involve any substantial question of law of general importance which needs to be decided by the Supreme Court. Hence, the prayer is rejected.

Dt: 16-2-2000 (D.M. Dharmadhikari, C.J.)

(C.K. Thakkar, J)